

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST
FOR REVIEW BY:

ROBEN B. HALL

Petitioner.

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CHARGE NO.: 2009CF1980
EEOC NO.: 21BA90768
ALS NO.: 10-0242

ORDER

This matter coming before the Commission by a panel of three, Commissioners David Chang, Marylee V. Freeman, and Charles E. Box presiding, upon Roben B. Hall's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Respondent")¹ of Charge No. 2009CF1980; and the Commission having reviewed all pleadings filed in accordance with 56 Ill. Admin. Code, Ch. XI, Subpt. D, § 5300.400, and the Commission being fully advised upon the premises;

NOW, **WHEREFORE**, it is hereby **ORDERED** that the Respondent's dismissal of the Petitioner's charge is **SUSTAINED** on the following ground:

LACK OF SUBSTANTIAL EVIDENCE

In support of which determination the Commission states the following:

1. On November 17, 2008, the Petitioner filed an unperfected charge of discrimination with the Respondent, which was subsequently perfected on January 9, 2009. The Petitioner alleged in her charge that Wal-Mart Stores, Inc. ("Employer") failed to promote her because of her physical disabilities, Traumatic Head Injury and Reflex Sympothetic Dystrophy (Counts A and B), and her sexual orientation, homosexual (Count C), in violation of Section 2-102(A) of the Illinois Human Rights Act ("Act"). On March 16, 2010, the Respondent dismissed the Petitioner's charge for lack of substantial evidence. On April 5, 2010, the Petitioner filed a timely Request. On May 12, 2010, the Petitioner filed a Reply to the Respondent's Response.
2. The Employer's employees may apply for open positions within the Employer by using an on-line computerized Career Preference System ("System").

¹ In a Request for Review Proceeding, the Illinois Department of Human Rights is the "Respondent." The party to the underlying charge requesting review of the Department's action shall be referred to as the "Petitioner."

3. In early May 2008, the Petitioner used the System to apply for a promotion from her position of Overnight Stocker to the position of Cosmetics Department Manager.
4. On May 21, 2008, the Employer selected a different applicant for the position of Cosmetics Department Manager. The Employer stated the selected applicant was chosen because she was considered to be trustworthy and responsible, and the selected applicant had no disciplinary history.
5. The Petitioner had a disciplinary history.
6. In her charge, the Petitioner alleged the selected applicant was a non-disabled, non-homosexual person who was less qualified than herself.
7. In her Request, the Petitioner argues that the Employer did not provide any evidence that the non-disabled, non-homosexual applicant was better qualified for the position. The Petitioner further argues that non-disabled heterosexuals who had disciplinary histories were afforded opportunities for promotion, while the Petitioner was not afforded the same opportunities. Additionally, the Petitioner argues that there were discrepancies in the Respondent's investigation and that the Respondent's investigation file was incomplete.
8. In its Response, the Respondent asks the Commission to sustain the dismissal of the Petitioner's charge for lack of substantial evidence. The Respondent argues that the Employer articulated a non-discriminatory business reason for not promoting the Petitioner, and there was no substantial evidence that this articulated reason was a mere pretext for unlawful discrimination.
9. In the Petitioner's Reply, the Petitioner raises a new claim of retaliation which she did not allege in her original charge. The Petitioner also contends the Respondent made improper credibility determinations and disregarded the Petitioner's evidence.

CONCLUSION

The Commission concludes that the Respondent properly dismissed all counts of the Petitioner's charge for lack of substantial evidence. If no substantial evidence of discrimination exists after the Respondent's investigation of a charge, the charge must be dismissed. See 775 ILCS 5/7A-102(D). Substantial evidence exists when the evidence is such that a reasonable mind would find the evidence sufficient to support a conclusion. See In re Request for Review of John L. Schroeder, IHRC, Charge No. 1993CA2747, 1995 WL 793258, *2 (March 7, 1995).

The Commission concludes that there is no substantial evidence that the Employer failed to promote the Petitioner either because of her disabilities or her sexual orientation. The Commission finds that the Petitioner failed to establish *prima facie* cases of discrimination. Generally, to establish a *prima facie* case of discrimination, the Petitioner must show: (1) that she is a member of a protected class; (2) that she was performing her work satisfactorily; (3) that she was subject to an adverse action; (4) and that the Employer treated a similarly situated employee outside the Petitioner's protected classes more favorably under similar circumstances. See Marinelli v. Human Rights Commission, 262 Ill.App.3d 247, 634 N.E.2d 463 (2nd Dist. 1994).

An employer may consider qualities of an applicant which are not stated prerequisites in a job description, such as temperament and/or disciplinary history. See Board of Education v. Human Rights Comm'n, 135 Ill. App. 206, 481 N.E.2d 994, 90 Ill. Dec. 194, 196-197 (5th Dist. 1985). In the Petitioner's case, the Employer stated that the Petitioner's disciplinary history was a factor in its decision not to promote her.

In the Petitioner's case, there is no substantial evidence the Employer had treated a similarly situated employee outside the Petitioner's protected classes more favorably under similar circumstances. In particular, there has been no evidence presented that the selected applicant had a disciplinary history as egregious as the Petitioner's. Although the Petitioner speculates that the selected applicant was less qualified than the Petitioner, mere speculation or conjecture does not constitute evidence of discrimination. See Willis v. Illinois Dep't of Human Rights, 307 Ill.App.3d 317,

326, 718 N.E.2d 240 (4th Dist. 1999). Therefore, there is no substantial evidence that the Petitioner was similarly situated to the selected applicant.

Finally, as to the new claim of retaliation raised by the Petitioner for the first time in her Request, on a request for review, the Commission does not have jurisdiction to review new allegations or charges of discrimination. See 775 ILCS 5/ 8-103.

Accordingly, it is the Commission's decision that the Petitioner has not presented any evidence to show the Respondent's dismissal of her charge was not in accordance with the Act. The Petitioner's Request is not persuasive.

WHEREFORE, IT IS HEREBY ORDERED THAT:

The dismissal of the Petitioner's charge is hereby **SUSTAINED**.

This is a final Order. A final Order may be appealed to the Appellate Court by filing a petition for review, naming the Illinois Human Rights Commission, the Illinois Department of Human Rights, and Wal-Mart Stores, Inc., as Respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this Order.

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

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Entered this 12th day of January 2011.

Commissioner David Chang

Commissioner Marylee V. Freeman

Commissioner Charles E. Box